Filed 3/5/19 P. v. Salas CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON VELASQUEZ SALAS,

Defendant and Appellant.

F076402

(Super. Ct. No. SC059946A)

ORDER MODIFYING OPINION AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the nonpublished opinion filed on February 6, 2019, be modified as follows:

1. On page 3, between the block quote from *People v. Norrell* (1996) 13 Cal.4th 1 at the top of the page and before the paragraph beginning "On October 10, 2017," insert the following paragraphs:

> On August 28, 2017, Salas appeared in court with defense counsel for a hearing after remittitur on appeal. The court discussed our instructions to the court on remand, described above. The court noted that its own trial records had been destroyed in 2004, but that it had received various reporter's transcripts from this court. Defense counsel said his department's file contained mostly abstracts of judgment. The prosecutor said his department's file had been misplaced and was not traceable. The court stated it would email the transcripts to the prosecutor and defense counsel. The court asked if counsel wished to take a break to discuss a possible disposition. The prosecutor asked if they could hold a conference in chambers to determine how best to proceed.
>
> Following the conference in chambers, the court stated:

"[THE COURT:] We had a chambers conference to discuss further proceedings in this matter, and counsel indicated they want to take a look at the transcripts that the Fifth District Court of Appeal was nice enough to forward to us by e-mail.

"And I believe counsel indicated and our probation officer, also present with us, she was in our conference—chambers conference. I believe counsel indicated with a time waiver, set the next hearing for September 21st, I believe that's a Thursday morning, at 8:30 in this department. [¶] And in the meantime, counsel will have an opportunity to review the seven transcripts—seven volumes, opportunity to meet and confer on an appropriate disposition, determine if the gentlemen's eligible for re-sentencing. And if so, whether there's any danger to public safety should he be re-sentenced. And attempt to agree on an appropriate disposition. [¶] And then, after counsel have met and conferred, they can discuss matters with [the] probation officer, and then the matter can come back on the 21st at 8:30. [¶] … [¶]

"THE CLERK: [Salas is] going to stay here. He will remain in local custody. [¶] … [¶]

"THE COURT: That will be the order of the Court. [Salas] remains here and can meet and confer with [defense counsel] and discuss matters with [Salas]."

Salas then entered a time waiver and agreed that he would like to meet and confer with defense counsel rather than proceed directly. The court stated:

"All right. [Salas] then will be housed here locally for the convenience of [Salas] and [defense counsel]. And we'll continue the matter to September 21st, with the understanding that counsel will meet and confer after they've had an opportunity to read over the transcripts. Share any concerns with … our probation officer, and then be back here on September 21st at 8:30."

On September 21, 2017, the matter was continued for one week due to the trial court's schedule.

On September 28, 2017, the resentencing hearing was held. Salas appeared with defense counsel. The parties agreed they had both received the transcripts and had discussed them in chambers. In addition, a probation report had been prepared. The parties had conferred and agreed that resentencing Salas would pose no risk to public safety. As recommended by the probation report, the court sentenced Salas to 25 years to life on count 1,

a reduced term of eight years on count 2, plus two one-year prior prison term enhancements. The court then stayed the term on count 2 pursuant to section 654.

2. On page 9, delete the first full paragraph beginning "For all the reasons we have explained," and insert the following paragraphs:

Salas also contends defense counsel was ineffective because he failed to pursue a second-strike sentence (which, as explained, was in fact granted), present a statement in mitigation, and argue that the term on count 1, rather than count 2, should have been stayed. Salas argues counsel's ineffectiveness was so egregious that counsel completely failed to subject the prosecutor's case to meaningful adversarial testing, such that prejudice must be presumed pursuant to *United States v. Cronic* (1984) 466 U.S. 648 (*Cronic*). *Cronic* stated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (*Id.* at p. 659.) But the court later clarified that *Cronic*'s application is very narrow: "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." (*Bell v. Cone* (2002) 535 U.S. 685, 696-697; *Florida v. Nixon* (2004) 543 U.S. 175, 190 ["*Cronic* recognized a narrow exception to" the rule that a defendant claiming ineffective assistance of counsel must show prejudice].) As the California Supreme Court has stated in rejecting reliance upon *Cronic*: "Defendants have been relieved of the obligation to show prejudice [under *Cronic*] only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage. Neither factor is present here. In other circumstances, the petitioner must show how specific errors undermined the reliability of the verdict. [Citations.] Therefore, while petitioner argues that he is entitled to relief without a showing of prejudice, we conclude that he must satisfy the standards established in *Strickland v. Washington*[(1984)] 466 U.S. 668 [(*Strickland*)]." (*In re Visciotti* (1996) 14 Cal.4th 325, 353.)

The record of the resentencing proceedings on remand does not support Salas's characterization of defense counsel's performance. Counsel conferred with the prosecutor and the judge in chambers, reviewed the trial transcripts, conferred with Salas, and then conferred again with the prosecutor. As a result of these activities, the parties agreed that resentencing Salas would not pose a risk to the public's safety and thus could proceed. This resulting agreement clearly benefitted Salas. Although Salas lists a few actions he wishes counsel had undertaken in the resentencing phase, Salas clearly fails to show a complete lack of

adversarial testing under *Cronic*. Thus, Salas must show prejudice under *Strickland*.

This claim, however, fails under *Strickland*, as well. Under *Strickland*, a defendant must show (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial. (*Strickland, supra*, 466 U.S. at pp. 687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).) To establish prejudice, a defendant must make a showing "sufficient to undermine confidence in the outcome" that but for counsel's deficient performance there was a "reasonable probability" that "the result of the proceeding would have been different." (*Strickland, supra*, at p. 694; *Ledesma, supra*, at pp. 217-218.) On review, we can adjudicate an ineffective assistance claim solely on the issue of prejudice without determining the reasonableness of counsel's performance. (*Strickland, supra*, at p. 697; *Ledesma, supra*, at pp. 216-217; *People v. Hester* (2000) 22 Cal.4th 290, 296-297.) We will do so here because we see no reasonable probability the resentencing court would have agreed to stay the 25-year-to-life term on count 1 rather than the eight-year term on count 2. As we have explained, the nature of Salas's crimes fully justified imposition of the 25-year-to-life term.

Except for the modifications set forth above, the opinion previously filed remains unchanged. This modification does not effect a change in the judgment.

Appellant's petition for rehearing filed on February 14, 2019, is denied.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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DETJEN, J.

_____

SNAUFFER, J.

Filed 2/6/19 P. v. Salas CA5 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAMON VELASQUEZ SALAS, Defendant and Appellant.	F076402 (Super. Ct. No. SC059946A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Retired Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Detjen, J. and Snauffer, J.

Defendant Ramon Velasquez Salas contends on appeal (1) the trial court abused its discretion and violated due process when it resentenced him pursuant to Proposition 36, and (2) defense counsel provided ineffective assistance of counsel. We affirm.

PROCEDURAL SUMMARY

In 1994, Salas was convicted by jury trial of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1);[1] count 1), infliction of corporal injury on a spouse or cohabitant (§ 273.5, subd. (a); count 2), and misdemeanor battery (§ 243, subd. (a); count 3). The jury also found true allegations that Salas had suffered two prior felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served two prior prison terms (§ 667.5 subd. (b).)

The trial court denied Salas's *Romero*[2] motion to dismiss a prior felony strike conviction. The court sentenced Salas to 25 years to life on both counts 1 and 2, six concurrent months on count 3, plus two one-year prior prison term enhancements. The court stayed the term on count 1 pursuant to section 654.

On October 8, 2014, after the passage of Proposition 36, Salas filed a petition for resentencing. Salas was ineligible for resentencing on count 1 because it involved the use of a deadly weapon, but Salas was arguably eligible for resentencing on count 2. The trial court denied the petition, concluding that Salas was ineligible for resentencing on count 2 because he was armed with a knife during the offense in count 2.

Salas appealed and on May 1, 2017, we reversed the trial court's denial of defendant's petition because we concluded there was insufficient evidence to support the

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1 All statutory references are to the Penal Code.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

finding that Salas was armed with a knife during commission of the offense in count 2. We stated in our disposition:

> "The order denying the petition because Salas was not eligible for resentencing is reversed. On remand, the trial court must exercise its discretion in determining if resentencing Salas would pose an unreasonable risk to public safety, a determination that is made by applying the preponderance of the evidence standard of proof. (§ 1170.126, subd. (f); [*People v.*] *Arevalo* [(2016)] 244 Cal.App.4th [836,] 854.) Salas must be resentenced only if the trial court determines he is eligible for resentencing, and he does not pose an unreasonable risk to public safety. [¶] If the trial court concludes that Salas should be resentenced, the trial court may choose either felony conviction as the principal term pursuant to the provisions of section 1170.1, and consider the interpretation of section 654 as it existed when Salas committed the crimes. (*People v. Norrell* (1996) 13 Cal.4th 1, 5-6 [(*Norrell*)].)"

On September 28, 2017, at the resentencing hearing on remand, the trial court noted a short probation report had been prepared, the parties had held a discussion in chambers, and the parties agreed there was no indication defendant was a risk to public safety under the current provisions of law. The court sentenced Salas to 25 years to life on count 1, a reduced term of eight years on count 2, plus two one-year prior prison term enhancements. The court then stayed the term on count 2 pursuant to section 654.

On October 10, 2017, Salas filed a notice of appeal.

FACTS[3]

"Salas and the victim, E., lived together in 1994. In May 1994, E. had observed Salas with another woman, causing the relationship to become strained. On September 13, 1994, E. noticed Salas following her as she drove home from work. A

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3 The facts are taken from our unpublished opinion in *People v. Salas* (May 1, 2017, F072144) [nonpub. opn.].

short while after arriving home, Salas accused E. of having an affair with several men. Salas dismissed E.'s protestations of innocence, and demanded she apologize. E. refused since she continued to deny having an affair. Salas hit her in the face and eye three times.

"Salas next told E. he wanted her to accompany him on a drive. She agreed to meet Salas outside, hoping to escape in her own car. When she was outside, Salas forced her into his car. E. pleaded with Salas to take her home. Salas increased the speed of the car when she tried to get out. Salas ordered her to stay in the car when he went to visit friends. Eventually, Salas drove towards a small city to visit another friend, who he discovered was not at home. Salas then struck E. in the face and ordered her out of the car. Salas threw her into a cotton field, pinned her on the ground, and repeatedly hit her and tried to choke her. E. pleaded with Salas to stop, and asked him why he was beating her. Salas told her she knew why he was beating her. E. again denied having an affair, and asked with whom she was allegedly sleeping. Salas said the names of several people unknown to E.

"Salas then ordered E. back into the car, and demanded to know the names of her alleged boyfriends. E. refused to apologize and refused to get into the car. Salas drove the car towards her, pinning her legs against a chain link fence. E. ran towards some nearby farm equipment for safety. Salas exited the car and dragged her back into the car.

"E. attempted to placate Salas by engaging in 'sweet talk,' and asked him to take her home so she could go to work the following morning. Salas agreed, but ordered her to keep her head down so the police would not stop the car.

"Upon arriving home, E. went into the bedroom. Salas continued the argument and ripped the phone out of the wall. When E. refused to go to bed with him, Salas 'produced a knife and slashed [E.] across the chest.' E. cleaned the wound herself, and then fell asleep.

"Salas drove E. to work the next day. E. reported the incident to her co-workers and the police. She showed her co-workers the bruises caused by Salas."

DISCUSSION

Salas contends the resentencing court abused its discretion when it denied him a second-strike sentence. He explains that he had already served 23 years on count 2, and the resentencing court determined he was not an unreasonable risk to public safety. Salas argues he was wrongfully denied a second-strike sentence as required by Proposition 36 because the resentencing court failed to consider any of the factors and instead summarily reimposed the same sentence as originally imposed, which amounted to a violation of Salas's due process rights. He also contends defense counsel was ineffective for failing to file a mitigating statement, mention evidence, address factors, or request a second-strike sentence. He asserts that we should order the sentence on count 1 stayed and the sentence on count 2 executed.

The People respond that the resentencing court did in fact impose a second-strike sentence on count 2, the only count eligible for such sentencing. And while section 1170.126, subdivision (f) required the second-strike sentence on count 2, it did not prohibit the court from imposing a third-strike sentence on count 1.

In reply, Salas argues that pursuant to *Norrell*, the resentencing court should have imposed a sentence commensurate with Salas's culpability under the facts, which included the fact that he had already served 23 years and posed no unreasonable risk to public safety.

I. Law

In November 2012, California voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12. Prior to that, the former Three Strikes law mandated that a defendant who had been convicted of two or more serious or violent felonies would be subject to a sentence of 25 years to life (a third-strike

sentence) upon conviction of a new felony (a third strike). Proposition 36 amended the Three Strikes law so that some third-strike offenders could receive a second-strike sentence, depending on the severity of their new crime. Now, a defendant with two or more strikes who is convicted of a new felony is subject to a third-strike sentence only if the new felony is either serious or violent (or if certain exceptions apply); otherwise, he is sentenced as a second-strike offender. (*People v. Valencia* (2017) 3 Cal.5th 347, 353-354.)

Relevant to this case, Proposition 36 also added section 1170.126, which allows eligible inmates who are currently serving a 25-year-to-life sentence under the former Three Strikes law to petition the court for resentencing. Inmates have two years from the effective date of Proposition 36 to seek resentencing absent a "showing of good cause." (§ 1170.126, subd. (b).) An inmate is eligible to petition for resentencing if his sentence would not have been a 25-year-to-life sentence had he been sentenced under the newly reformed Three Strikes law—that is, if his third strike was not a serious or violent felony. (§ 1170.126, subds. (a), (b); *Teal v. Superior Court* (2014) 60 Cal.4th 595, 598.)

Resentencing a defendant is not allowed, however, if the resentencing court determines that doing so would pose an unreasonable risk of danger to public safety. (*People v. Johnson* (2015) 61 Cal.4th 674, 682 (*Johnson*); § 1170.126, subd. (f) [if a petitioning inmate meets the statutory eligibility requirements, "the petitioner shall be resentenced … unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety"].)[4]

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[4] In determining if a petitioner poses an unreasonable risk of danger, the court has broad discretion to consider: "(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1176.126, subd. (g);

II. Analysis

Applying these principles, the resentencing court here found Salas eligible for resentencing, and did not find that resentencing him would pose an unreasonable risk to public safety. Thus, the court was required to resentence Salas. But the court was not required to resentence Salas to a lower aggregate sentence. Instead, the court had the discretion to reconsider Salas's entire sentence and all sentencing choices. (*People v. Garner* (2016) 244 Cal.App.4th 1113, 1118 (*Garner*) [when resentencing a defendant under the resentencing provisions of Proposition 36, the trial court has authority similar to that exercised by a trial court resentencing a defendant pursuant to section 1170, subdivision (d); " 'When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme.' "];[5] *People v. Buycks* (2018) 5 Cal.5th 857, 893 [recognizing application of the "full sentencing rule" to Proposition 36 cases under *Garner*; "on remand for resentencing 'a full resentencing as to

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People v. Valencia, supra, 3 Cal.5th at p. 354.) "Thus, as the Legislative Analyst explained in the Voter Information Guide, '[i]n determining whether an offender poses [an unreasonable risk of danger to public safety], the court could consider *any evidence* it determines is relevant, such as the offender's criminal history, behavior in prison, and participation in rehabilitation programs.' (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36 by Legis. Analyst, p. 50, italics added.)" (*Ibid.*) The prosecution must prove a petitioner's dangerousness by a preponderance of the evidence. (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1301, 1303, 1305.) We review the trial court's decision regarding dangerousness under the deferential abuse of discretion standard. (See *id.* at p. 1303.) The court's ruling will not be reversed on appeal unless defendant demonstrates that the court exercised its discretion in " 'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

5 " 'Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.' " (*Garner, supra*, 244 Cal.App.4th at p. 1118.)

all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances' "].)[6]

Furthermore, under former section 654, the resentencing court had the discretion to stay the sentence on the greater term, provided the punishment was commensurate with Salas's culpability under the facts.[7] Although the court did not discuss its considerations

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[6] The trial court was statutorily prevented from imposing a longer sentence than originally imposed. (§ 1170.126, subd. (h)).

In *People v. Hubbard* (2018) 27 Cal.App.5th 9, the case cited by defendant as additional authority, the trial court, on remand after a successful Proposition 36 petition, concluded it lacked jurisdiction to consider a motion to strike prior felony convictions and resentence on the remaining count. The appellate court disagreed, citing *Garner* and the "full sentencing rule" for the proposition that the trial court had jurisdiction to reconsider all of the sentencing choices: "Our remand to the trial court directed the trial court to determine whether defendant was eligible for resentencing under section 1170.126. Even though defendant's eligibility for resentencing was based solely on the reckless evasion conviction, just as in *Garner*, once the trial court 'recalled' his sentence under Proposition 36, the trial court was 'entitled to consider the entire sentencing scheme.' (*Garner*, *supra*, 244 Cal.App.4th at p. 1118.) Despite the People's contentions, *Johnson* does not change our analysis, since the court's limited holding addressed eligibility for resentencing, and did not purport to limit the trial court's well-settled ability to consider all aspects of the original sentence at resentencing. (*Johnson*, *supra*, 61 Cal.4th at p. 679 ['we hold … that the presence of a conviction of a serious or violent felony does not disqualify an inmate from resentencing with respect to a current offense that is neither serious nor violent'].)" (*Hubbard*, *supra*, at p. 13.) In the present case, the trial court *did* reconsider all its sentencing choices.

[7] When we advised the trial court to consider on remand the interpretation of section 654 in 1994 when Salas committed the crimes, we referred to *Norrell*, *supra*, 13 Cal.4th 1. In *Norrell*, the Supreme Court concluded the trial court had discretion under section 654 to stay the *greater* term and impose the *lesser* term. (*Norrell*, *supra*, 13 Cal.4th at pp. 6-7.) The court noted that "in any given case, although a defendant may be convicted of multiple crimes, the most appropriate punishment under the specific circumstances of the case may not be for the offense that yields the greatest potential term of punishment. Under Penal Code section 654, a trial court has discretion to impose a sentence that is commensurate with what it determines on the facts to be a defendant's culpability, as opposed to 'culpability' established mechanically by adding together penalties and enhancements to arrive at the greatest overall potential prison sentence." (*Id.* at p. 8.) *Norrell* also noted that the Supreme Court had implicitly sanctioned this

in this regard on the record, our recitation of the facts of Salas's horrific offenses readily supports the court's implied finding that a 25-year-to-life sentence was commensurate with Salas's culpability. Thus, the court was justified in staying the lesser term and imposing the greater term. As for Salas's claim that the court failed to consider the various factors, or place its considerations on the record, and thus failed to exercise informed discretion, we note that a court is "presumed to have been aware of and followed the applicable law" when imposing a sentence.[8] (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) Therefore, the burden is on Salas to demonstrate that the court misunderstood its sentencing discretion. (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523.) We see nothing to support such a conclusion. Indeed, we see no abuse of discretion and no violation of Salas's due process rights in the court's sentencing decisions.

For all the reasons we have explained, we also conclude defense counsel was not ineffective for failing to pursue a second-strike sentence (which, as explained, was in fact granted) or for failing to argue that the term on count 1, rather than count 2, should have been stayed. To establish ineffective assistance of counsel, a defendant must show (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*); *People v. Ledesma*

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discretion for many years, and the legislature, although clearly empowered to do so, had not amended section 654 to limit the trial court's discretion. (*Norrell* at pp. 6-7.)

The following year, however, the legislature abrogated the holding in *Norrell* and amended section 654 to require that the defendant be " 'punished under the provision that provides for the longest potential term of imprisonment.' " (Stats. 1997, ch. 410, § 1; see *People v. Kramer* (2002) 29 Cal.4th 720, 723-724.)

8 We also note that the trial court stated on the record the parties had held a discussion in chambers, and the clerk noted: "Off the record, court and counsel hold conference in chambers and thereafter defense counsel confer[s] with defendant."

(1987) 43 Cal.3d 171, 216-217 (*Ledesma*).) To establish prejudice, a defendant must make a showing "sufficient to undermine confidence in the outcome" that but for counsel's deficient performance there was a "reasonable probability" that "the result of the proceeding would have been different." (*Strickland*, *supra*, at p. 694; *Ledesma*, *supra*, at pp. 217-218.) On review, we can adjudicate an ineffective assistance claim solely on the issue of prejudice without determining the reasonableness of counsel's performance. (*Strickland*, *supra*, at p. 697; *Ledesma*, *supra*, at pp. 216-217; *People v. Hester* (2000) 22 Cal.4th 290, 296-297.) We will do so here because we see no reasonable probability the resentencing court would have agreed to stay the 25-year-to-life term on count 1 rather than the eight-year term on count 2. As we have explained, the nature of Salas's crimes fully justified imposition of the 25-year-to-life term.

DISPOSITION

The judgment is affirmed.